

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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:
SENISI, et al., : 13-CV-3314 (LTS)
:
Plaintiffs, : September 5, 2013
:
v. : 500 Pearl Street
: New York, New York
JOHN WILEY & SONS, INC., :
:
Defendant. :
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TRANSCRIPT OF CIVIL CAUSE FOR DISCOVERY CONFERENCE
BEFORE THE HONORABLE LAURA TAYLOR SWAIN
UNITED STATES CHIEF DISTRICT JUDGE

APPEARANCES:

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1 THE COURT: This is the initial pretrial conference
2 in the matter of Senisi v. John Wiley & Sons, Number 13-CV-
3 3314.

4 I'm Judge Swain. For the benefit of the digital
5 audio record, counsel would you please introduce yourselves by
6 way of stating your appearances.

7 MR. McCULLOCH: Good afternoon, Your Honor. Kevin
8 McCulloch from Nelson & McCulloch for plaintiffs.

9 THE COURT: Good afternoon, Mr. McCulloch.

10 MR. NELSON: And Dan Nelson from Nelson & McCulloch
11 also for plaintiffs.

12 THE COURT: Good afternoon, Mr. Nelson.

13 MR. NELSON: Good afternoon.

14 MS. BEEBER: Jessie Beeber, Frankfurt Kurnit for
15 defendant Wiley.

16 THE COURT: Good afternoon, Ms. Beeber.

17 MS. KADYSHEVICH: Anna Kadyshevich, Frankfurt Kurnit
18 for defendant Wiley as well.

19 THE COURT: Good afternoon, Ms. Kadyshevich. Good to
20 meet you.

21 The principle matter I think on which we need to
22 focus today is the premotion conference with respect to the
23 defendant's request to stay discovery pending resolution of
24 the motion to dismiss, and I note that earlier this afternoon
25 I signed the stipulation extending slightly the briefing

1 schedule on that motion. So that should appear on the ECF
2 system within a day or so, if not by this afternoon.

3 What discovery requests are pending or outstanding
4 at this point, if any?

5 MR. McCULLOCH: Your Honor, Kevin McCulloch for
6 plaintiffs. We actually received the request to stay when we
7 began the meet and confer process under Rule 26. So no
8 discovery has been served because the defendant wouldn't meet
9 and confer and before we, plaintiffs, could request Your Honor
10 compel that discovery would proceed and enter a discovery
11 schedule the plaintiff -- the defendant requested a pre-motion
12 conference on the stay and Your Honor granted the request to
13 hear that issue today. So over the last couple of weeks
14 nothing has transpired. There is no outstanding discovery
15 that's been served yet.

16 THE COURT: And in terms of your near term
17 anticipated waves of discovery, can you give me a general
18 sense of the nature and scope of the request that you
19 anticipate?

20 MR. McCULLOCH: Yes, Your Honor. Just given the
21 nature of the claims I think it would make sense to focus on
22 the narrow licensing history of the plaintiff's images John
23 Wiley's uses thereof. This is pretty elementary discovery
24 that -- there's really no question about whether or not it
25 would be within the scope of Rule 26. We would request copies

1 of the actual licenses and the usages of the photos identified
2 in those licenses and then revenue data, et cetera, the basic
3 elements of a claim for copyright infringement. We would
4 focus on the copyright claims specifically. I think that
5 there's no doubt that those claims will proceed. There might
6 be some question about the DEC action claims and given the
7 nature of those legal questions we can focus on the copyright
8 claims in discovery.

9 I'd note that this Court has in my knowledge never
10 stayed discovery in these types of claims against John Wiley.
11 I cited seven different instances in which Wiley has sought a
12 stay of discovery. Three times Judge Dolinger all in related
13 cases he denied them at an initial pretrial conference. They
14 reiterated and renewed their motion for a stay to Judge
15 Dolinger in those three cases, denied again. Even in cases
16 where claims, copyright claims eventually have been dismissed
17 Judge Freeman denied a stay of discovery. In fact, the
18 ultimate dismissal of the copyright claims was based on
19 affidavits that pertain to elements that were uncovered in
20 discovery. I'm not aware of any copyright claims in this
21 district against textbook publishers where there has been a
22 stay of discovery ordered. Pearson has sought similar stays
23 also from Judge -- in cases before Judge Etkin, in cases
24 before Judge Holwell and in cases in front of Judge Rakoff all
25 of them have been denied.

1 The elements of our pleadings are identical to the
2 claims in front of Judge Etkin that Judge Etkin repeatedly has
3 found can proceed. Judge Etkin has contrary to the
4 representations of Wiley's motion denied -- dismissed any of
5 the copyright claims in the Young Wolf or the Rubin or the
6 Warren case. He also didn't dismiss any of the claims in the
7 Schneider or the Soyhoyos case. All of those cases have
8 identical allegations against the same defendant for the exact
9 same conduct, pled in the same manner where we identified the
10 license violations in the complaint and attach exhibits of the
11 photos and the books at issue to whatever extent we can obtain
12 the information prior to discovery and the claims are made
13 based upon that information. And all of them have proceeded
14 to discovery. None have been dismissed except where there is
15 an arbitration clause and Wiley doesn't make that argument
16 here. That's the Kohl case. That argument has not been made
17 here and so the Kohl ruling by Judge Freeman is in a posit.

18 But I'd also note that even where Judge Kohl
19 ultimate -- or Judge Freeman ultimately dismissed the claims
20 in the Kohl v. Wiley case, she didn't stay discovery and
21 discovery proceeded in that case as well.

22 So in our opinion focusing on the copyright claims
23 would be I think an appropriate way to narrow the scope of
24 discovery at this point to avoid any potential prejudice. We
25 would focus on the licensing history of plaintiff's works by

1 Wiley, the usages of those photos and the elements of damages
2 related thereto, profits attributable to loss, license fees,
3 et cetera. Those are basic elements of the copyright claim.

4 There would be broader discovery necessitated later
5 on policies and procedures, et cetera, that Wiley has been
6 ordered to produce in every case but at this point I think the
7 basic elements of discovery should at least proceed if not all
8 of it, Your Honor.

9 THE COURT: Thank you. Ms. Beeber.

10 MS. BEEBER: Your Honor, I'd like to back up sort of
11 to the beginning for a moment here and talk about the claims
12 that the seven plaintiffs are bringing in this case. The
13 seven plaintiffs are all photographers, all represented by the
14 same attorneys who have represented those same photographers
15 in other photographers in cases against Wiley and other
16 textbook publishers as well. This case, however, is very
17 different from the other kinds of cases that these plaintiff's
18 counsel have brought in the past and it's different for a
19 couple of reasons.

20 The first is that they make a copyright infringement
21 claim sort of on behalf of all seven photographers alleging
22 vaguely that all of the photographers took photographs were
23 licensed to Wiley either through unidentified photo agencies
24 or them themselves and were infringed in a one paragraph sort
25 of laundry list of acts. These seven photographers did not

1 take any photographs together. They each took their own
2 separate photographs at different times, used different
3 licensing agencies at different times, have completely
4 different facts regarding what Mr. McCulloch calls the simple
5 elements of the copyright infringement claim.

6 THE COURT: Well, let's say I were to find merit in
7 your misjoinder argument.

8 MS. BEEBER: Yes.

9 THE COURT: Let's just say that still wouldn't
10 visciate the individual's copyright claims, it wouldn't in and
11 of itself visciate the individual's copyright claims and so to
12 the extent I exploded the case and made them pay six more
13 filing fees you're still going to get the same question.

14 MS. BEEBER: I agree with that, Your Honor. I'm
15 actually making a little bit of a different point which is --

16 THE COURT: I'm sorry.

17 MS. BEEBER: -- in the other cases that Mr.
18 McCulloch mentioned while they may have attached an exhibit
19 like they did in this case they attached Exhibit 7 through 11
20 to the complaint which are each just a chart of every time
21 they say a photo was licensed to Wiley by a particular
22 photographer. In the other cases that Mr. McCulloch was
23 talking about, for instance in the Warren case there was one
24 photograph that was identified as being infringed and that
25 photograph was pled in the complaint. In the Rubin case there

1 was one photograph that they allege was infringed. That was
2 pled in the complaint. In the Young Wolf case there were 17
3 photographs pled in the complaint and then the long laundry
4 list exhibit that was attached.

5 What Judge Etkin said is that the copyright
6 infringement claim proceeds with respect to the 17 that are
7 identified in the complaint but you can't just attach an
8 exhibit with a lot of images and a lot of dates and say that
9 that's your copyright infringement claim. So, here, although
10 Mr. McCulloch is saying it would be a very simple matter of us
11 producing the licenses and the uses of the images, the huge
12 question, the question to be decided on our motion to dismiss
13 is what images are you talking about. There is no particular
14 image pled in the complaint with respect to any particular
15 plaintiff and that is why going forward with discovery right
16 now -- you know, we meet all of the standards for a stay.

17 The breadth of discovery is incredibly wide because
18 they have 222 images listed in the exhibits of their
19 complaint. They're not even saying that all of those were
20 infringed but they're saying this is it, now you produce all
21 the licenses and all the usage information with respect to
22 those images. I would submit they at least have to have an
23 allegation in the complaint saying yes, this image was
24 infringed.

25 As far as prejudice, the prejudice to us is great

1 because we have to open our record room and produce all this
2 information before it's even decided what copyright claims are
3 in the case.

4 Now, another thing that distinguishes this case from
5 every one that they brought in the past except for one is that
6 they're asking for a declaratory judgment that they are
7 entitled to some audit and accounting through Wiley's books
8 and records. Now, first of all, that's a completely
9 unprecedented claim. Judge Daniels just dismissed that exact
10 same claim brought by the exact same lawyers, the exact same
11 plaintiff Senisi against Hobb Mifflin and he said there's no
12 right under the copyright act to an audit and therefore you do
13 not have a basis for bringing a declaratory judgment action
14 seeking an audit.

15 Now, if we were to give them discovery on that issue
16 they would be getting the ultimate relief that they are
17 seeking in this case with respect to their declaration before
18 our motion to dismiss has even been reviewed and decided.
19 That is highly prejudicial.

20 THE COURT: Well, they say they're not asking for
21 discovery relevant to the declaratory judgment claim, at least
22 on the front end of this case.

23 MS. BEEBER: If we went forward there would have to
24 be some very clear stipulation to that effect and I think the
25 problem with them saying that is that those source of claims

1 are completely intertwined with the amorphous copyright claims
2 that they're making because they haven't identified in the
3 complaint what images they are saying are infringed. If they
4 have these long lists of everything that they say was ever
5 licensed to Wiley and we then have to produce them information
6 on those regardless of whether they're saying those images
7 were infringed or not, that is the same relief that they're
8 seeking in the DEC action. It's the exact same thing. It's
9 saying account to us on all of these images regardless of
10 whether we say they were infringed or not.

11 Getting to the strength of our motion, I think I
12 have addressed that to some extent already. Obviously to
13 plead a copyright claim you cannot just attach exhibits full
14 of lists of images. You have to say what image was infringed,
15 when it was infringed, how it was infringed, et cetera, and
16 you have to do that for each plaintiff and for each image.
17 You can't mush all of the plaintiffs together.

18 And another thing that we pointed out in our motion
19 to dismiss is that two of these plaintiffs, Hankin and Newman,
20 do not have any copyright claims at all. No copyright
21 infringement claims pled whatsoever and plaintiff's counsel
22 has confirmed that to us. So with respect to them if there's
23 no discovery happening on the declaratory judgment action
24 certainly there should be no discovery whatsoever with respect
25 to them.

1 Again, I have to come back to them saying very
2 easily we won't seek discovery on the declaratory judgment
3 action because I think it's all just the same thing.

4 THE COURT: You're saying to the extent they're
5 seeking revenue and usage information with respect to -- and
6 the licensing history that is in effect a generalized audit at
7 least to the extent that they haven't made specific claims of
8 infringement?

9 MS. BEEBER: That is absolutely right, Your Honor.
10 That's what I'm saying. So I understand there's no automatic
11 stay just because you file a motion to dismiss. What I'm
12 saying is that this is an unusual case. Because of the way
13 that they pled their claims I think going forward with the
14 discovery right now basically gives them the ultimate relief
15 they're seeking in the case and puts us to an incredible
16 burden of producing documentation on images that they're not
17 even saying were infringed. That's why we should be entitled
18 to a stay.

19 THE COURT: Thank you. Mr. McCulloch.

20 MR. McCULLOCH: Your Honor, I'd actually like to
21 address these issues in reverse order from Ms. Beeber's
22 presentation. So I'll address the contention that the relief
23 that we're seeking the DEC action is the same discovery we
24 would be seeking under -- with respect to the copyright claims
25 and that's just patently false.

1 The DEC action is a -- seeks relief that we are
2 entitled to the information without having to file a copyright
3 claim and wait until discovery to get the information.
4 Getting it under Rule 26 doesn't in any way moot the question,
5 the legal question about whether or not we're entitled to it
6 presuit, number one.

7 Number two, and much more importantly, the DEC
8 action pertains to the claim -- to the photos not capable of
9 being identified. Meaning the discovery we would seek pertain
10 to the photos identified in the charts we are able to identify
11 that have been used by Wiley. The DEC action seeks the
12 information for the broader universe of plaintiff's photos
13 that Wiley has used without any licensing information being
14 provided to the plaintiffs. So Ms. Beeber is just wrong. The
15 DEC action is much broader than the licensing history of the
16 photos identified in the exhibits. They are different issues.
17 They're pertaining to a broader set of photos and it would be
18 a presuit relief, not Rule 26.

19 On this point I'd like to note Judge Daniels
20 dismissed plaintiff's DEC action claim because he ruled that
21 we would be entitled to it in discovery anyhow. That is --
22 that's sort of misnomer that Wiley is skipping over here.
23 Judge Daniels said you're going to get this anyhow, I'm
24 dismissing the DEC action even though -- because there's no
25 third -- you're not a third party beneficiary of the licenses.

1 Plaintiff's in this case, however, have direct licenses to
2 Wiley. So Judge Daniels' ruling is in a closet. But even if
3 it applied his ruling was you're going to get licensing
4 history in discovery anyhow, I'm dismissing the DEC action, go
5 ahead and seek this information and he didn't stay discovery
6 while that motion was pending. He didn't stay discovery
7 during argument on the motion. Discovery proceeded and Judge
8 Daniels didn't stay discovery even though there are identical
9 claims in that case as there are in this case.

10 With respect to the question about whether or not
11 plaintiffs identified the photos and alleged copyright
12 infringement for the photos, Ms. Beeber is just patently
13 misconstruing the rulings of this court and mischaracterizing
14 the pleadings.

15 Let me focus on an example. David Young [Ph.] v.
16 Wiley. There are two exhibits to that complaint. One is 17
17 photos in 50 or so books that are copyright claims. Then
18 there's Exhibit 2 which are a much broader set of photos that
19 are contract claims. Judge Etkin dismissed the contract
20 claims, let the copyright claims proceed. Both are in
21 exhibits. There's no part of Judge Etkin's ruling that says
22 I'm dismissing it because it's in a chart that's attached to
23 the complaint as opposed to the body of the pleadings. That
24 distinction is irrelevant.

25 THE COURT: Will you as plainly and directly as you

1 can respond to Ms. Beeber's assertions as I understand it that
2 to the extent copyright claims have been held properly pleaded
3 in these cases the plaintiff has identified particular images
4 and particularized his or her contention that the
5 particular -- the copyright in the particular image has been
6 infringed?

7 MR. McCULLOCH: Yes. Judge Etkin has ruled on this
8 issue in Schneider v. Pearson, Rubin v. Wiley, Warren v. Riley
9 and David Young v. Wiley, four decisions in the last eight
10 months by Judge Etkin. He's reached the same conclusion in
11 every case. He says a single paragraph outlining the types of
12 infringements is sufficient to put Wiley on notice of the
13 types of infringement claims against it and it out of an
14 abundance of caution -- this is quoting Judge Etkin "Wiley can
15 presume that all sorts of infringement are being contended,"
16 and that's what we do here.

17 THE COURT: So are you saying that you are making a
18 contention in this complaint that every single image listed in
19 your exhibits has been infringed in one or more of the ways in
20 your omnibus paragraph?

21 MR. McCULLOCH: Yes. Exhibit 7 through 10 include
22 lists of the photos and the books and licensing parameters
23 where they're available and our contention is in one of the
24 various ways that we've identified in the complaint Wiley has
25 infringed copyrights in each and every one of those photos. I

1 can direct Your Honor to Paragraphs 108 through 115.

2 THE COURT: I'm looking at 109. It says plaintiffs
3 assert copyright infringement claims related to the photos
4 identified in 7 through 10. It doesn't say each and every and
5 so --

6 MR. McCULLOCH: The reason that we put that paragraph
7 in is because Wiley made the same argument in the Young Wu
8 case and says there's a whole host of photos in this big chart
9 and we don't know what infringement claims apply to what.

10 THE COURT: So you're stating on the record here as
11 an officer of the court that the intent of this paragraph is
12 to indicate that there is a copyright infringement claim
13 asserted with respect to each and every photo as opposed to
14 relating somehow to something in the list?

15 MR. McCULLOCH: Yes. Yes, Your Honor. The reason
16 that is the case, just so that we're clear, as this court has
17 held on at least a half a dozen occasions and as almost every
18 court that I'm aware of in the country has held, the defendant
19 Wiley has sole possession of the information to make our more
20 specific allegations. Those are license. The license
21 includes a whole host of parameters. A print one, a language
22 restriction, a territory restriction, a usage restriction and
23 what book it can go in. Wiley knows the print run. Wiley
24 knows if it produced -- if it granted foreign licenses. Wiley
25 knows if it reused the photo in a different book without

1 permission but Wiley won't share that information. But we do
2 know that Wiley has been held liable multiple times involving
3 these same types of cases and the evidence in those cases
4 suggest that Wiley had corporate policies that it capped --
5 for instance, capped print run numbers at 100,000 even though
6 it knew it was printing millions of copies of certain books.

7 Because the information is in Wiley's sole
8 possession we assert copyright claims under rule 11 upon
9 information and belief. The evidence from other cases
10 provides more than sufficient information and belief for us to
11 assert those claims and then discovery proceeds and then we
12 amend the complaint to narrow the scope so that we identify
13 which specific claims go with which specific photos. This is
14 the whole exercise of why Rule 11 exists. We briefed this
15 issue to this court almost a dozen times now in Wu v. Pearson
16 I, Wu v. Pearson II, Schneider v. Pearson, Rubin v. Wiley,
17 Warren v. Wiley, David Young v. Wiley, Soyhoyos v. Wiley. All
18 of those claims have been asserted and pled in the identical
19 fashion as we do here. All of those claims have proceeded.
20 The only times that claims have been dismissed are Cole v.
21 Wiley where there is an arbitration clause and discovery
22 wasn't stayed in that case and there were subsequent
23 additional amended complaint in Cole v. Wiley. Discovery was
24 allowed on that and Wiley submitted affidavits to the court
25 that it didn't publish those photos, that we had misidentified

1 them and Judge Freeman dismissed the claims after discovery
2 based upon that representations from Wiley.

3 THE COURT: Thank you.

4 MR. McCULLOCH: I think that gives us the weight of
5 why the defendant's motion is weak.

6 Then the final -- I'm sorry.

7 THE COURT: Do you have a final point?

8 MR. McCULLOCH: Yes. Just Ms. Beeber said on the
9 joinder issue whether or not the case should be settled, that
10 these photographers never took photos together, didn't work
11 together, aren't in the same agencies and are in different
12 books and just none of that's true. Ms. Dwight and Ms. Senisi
13 worked together on a regular basis. Their images appear in
14 all of the same books. That's because there's not a lot of
15 people taking pictures of this type of content.

16 THE COURT: As I indicated in one of my first
17 comments to Ms. Beeber the question of whether these people
18 are ultimately all properly joined together in this particular
19 case is not for me a significant factor in the issue of
20 whether discovery should go forward at this point. Obviously
21 it's a core issue raised in the motion to dismiss but there's
22 no need to argue that issue right now.

23 MR. McCULLOCH: I guess I was just giving you a
24 teaser. Thanks, Your Honor.

25 THE COURT: Thank you. Briefly, Ms. Beeber.

1 MS. BEEBER: Yes, Your Honor. I'd like to address a
2 couple of points. I think that what Mr. McCulloch has said
3 here today that every single image listed in the exhibits is
4 claimed to have been infringed underscores why we need a stay
5 of discovery. The reason for that is this. Plaintiffs and
6 defendants have a basic dispute about what you need to plead
7 in order to have a copyright claim that can go forward. As we
8 put in our brief you have to plead which specific original
9 works are the subject of the copyright claim that plaintiff,
10 each plaintiff -- there are seven in this case -- owns the
11 copyrights in those works, that the copyrights have been
12 registered in accordance with the statute, and number four, by
13 what act and during what time the defendant infringed the
14 copyright.

15 Now, he can say I attached an exhibit with 222
16 images on it with different information for each one and now
17 discovery should go forward. What I say is they have to be
18 put to this pleading test first. They have to say what images
19 were infringed and how and when and that they have copyrights
20 in each of them and that the copyrights had been registered,
21 and until that has happened it's prejudicial and burdensome
22 for Wiley to have to go forward with discovery on 222
23 different images.

24 So I don't think that what he has said proves that
25 the stay should be denied. I think that it proves that the

1 stay should be granted.

2 Now, I have a lot of things to address with respect
3 to what Mr. McCulloch said and I think the first thing that I
4 want the court to understand is I do not misrepresent. I do
5 not obscure. I've never been in a situation with attorneys
6 who have accused me so often of making misstatements and lying
7 and I am not lying about what Mr. -- what Judge Daniels did
8 when he dismissed the declaratory judgment action in Senisi.
9 Judge Daniels did not say that they were entitled then to
10 discovery until all of the various claims --

11 THE COURT: I recognize that I will have to read
12 these other decisions for myself and develop my own
13 understanding --

14 MS. BEEBER: Yes, Your Honor.

15 THE COURT: -- of them as I get into the merits of
16 the motion to dismiss.

17 MS. BEEBER: I agree, Your Honor.

18 THE COURT: And I also recognize that each side has
19 different understandings and positions as to the significance
20 of those other decisions.

21 MS. BEEBER: Yes. That was the other point I was
22 going to make which is just the court should look for itself
23 to what those decisions say in Warren and Wiley and Rubin and
24 Soyhoyos. There's only one plaintiff in each of those cases,
25 not seven different plaintiffs joined together and I think

1 read through that lens the court would understand that those
2 cases very clearly said you have to identify the works that is
3 being infringed and how and when and in what manner.

4 The Cole case was not just dismissed because of the
5 arbitration clause. If you read Judge Freeman's decision --

6 THE COURT: I'll read -- I will look forward to
7 reading those and reading the briefing on those issues.

8 MS. BEEBER: Thank you, Your Honor.

9 THE COURT: I thank both counsel for your candor and
10 for the depth of the analysis and arguments that you've
11 offered on this question of the discovery stay.

12 The oral application for a stay of discovery pending
13 resolution of the motion to dismiss is denied without
14 prejudice to objections to particular requests but I will tell
15 you right now that an objection that reiterates the arguments
16 that have been made here about the impropriety of a request
17 for licensing information with respect to each of the
18 identified licenses will not be successful. So the decision
19 to let discovery proceed in the initial stages is a decision
20 that in gross confirms the court's view the propriety of the
21 type and scope of discovery that Mr. McCulloch described when
22 I asked him what his front end discovery would be.

23 So with that, I am going to depend on the parties to
24 be clear and reasonable and cooperative with each other in
25 proceeding with the early phase discovery pending an adjourned

1 pretrial conference to make in good faith the consultations
2 with each other including discussions of settlement as
3 contemplated and directed by my initial conference order and
4 in aid of the preparation of the joint preliminary pretrial
5 statement that is required by that initial conference order,
6 and I'm going to put this conference out to early December so
7 that that will permit some time for you all to focus on the
8 conclusion of the briefing on the motion to dismiss to have
9 discussions with each other both on the specific issues
10 identified in the initial conference order and other issues
11 related to discovery and I hope to be potential for settlement
12 here and then we'll come back and set a discovery schedule and
13 I may or may not have resolved the motion to dismiss by the
14 early December date.

15 Ms. Ing, may I have an early December initial
16 pretrial conference date?

17 [Pause in proceedings.]

18 THE COURT: Is everybody available as far as you know
19 on December 6th at 10:30 in the morning?

20 MR. McCULLOCH: Yes, Your Honor, plaintiffs are
21 available.

22 THE COURT: Thank you. I pressed some button on my
23 computer that made it to a weird thing. So give me just a
24 moment.

25 [Pause in proceedings.]

1 THE COURT: Thanks for your patience. Ms. Beeber.

2 MS. BEEBER: Your Honor, I would like to ask two
3 things. The first is that we have an opportunity to formally
4 brief the motion for stay of discovery and ask Your Honor to
5 consider those papers. It was based just on the two letters
6 that were submitted and the few minutes that we had to talk
7 today and I think given the issues that Mr. McCulloch has
8 raised about what they're actually claiming and what they're
9 actually looking for we would like an opportunity to submit a
10 motion to stay.

11 THE COURT: I will not preclude you from doing that.
12 I leave it to your own judgment as to whether it's an
13 appropriate use of yours and your client's time and resources.

14 MS. BEEBER: Thank you. In the meantime, I would
15 like to have it clear what discovery it is that is to proceed
16 in the meantime. Mr. McCulloch said some things today about
17 what he's seeking and what he isn't seeking and Your Honor
18 seemed to say that yes, what he was seeking is appropriate for
19 now but in that statement it suggests that other things are
20 not appropriate right now. The broader discovery on the
21 declaratory judgment action for instance. So I would just
22 like Mr. McCulloch to say or for us to have a clear
23 understanding before we're off the record today of what
24 discovery can go forward in the meantime and what cannot.

25 THE COURT: Mr. McCulloch described what I understood

1 to be paper discovery concerning the documentation and usage
2 history of the licenses and the works that are described in
3 the attachments to the complaint and he undertook not to do
4 discovery in aid of the contractual right declaratory judgment
5 claim. So I would anticipate that it would be paper discovery
6 consistent with those representations and not deposition
7 discovery and [inaudible] return. Mr. McCulloch, is that an
8 appropriate understanding of your undertaking?

9 MR. McCULLOCH: Yes, Your Honor. I think that we
10 would obviously serve some interrogatories just to clarify
11 what databases, et cetera would be searched and such but I
12 think they would just be our general 33(a) initial
13 interrogatories, not contention interrogatories which
14 obviously will be later. We can agree not to proceed with the
15 depositions at this time and just focus on the paper discovery
16 and as I explained at the outset our primary concern at this
17 point would be to get the licensing history of the -- for the
18 books and photos identified in the exhibits and then the usage
19 history for all of those photos. As we allege in the
20 complaint Wiley would get a license for Book A and then
21 reprint the pictures in Book B, C and D. So getting usage
22 history for the photos is an essential element and then the
23 damages discovery would be gross revenue, lost license fees,
24 et cetera as set forth in Section 504 of the Copyright Act.
25 That would be again limited to whatever books Wiley published

1 the plaintiff's photos in. We would get the licensing history
2 necessary to make out lost license fees related to those books
3 and then the revenue data for those books as well.

4 I think those are the general three or four or five
5 categories of discovery that we would focus on, Your Honor.

6 THE COURT: As to the two plaintiffs who Ms. Beeber
7 said are not asserting copyright claims here, will you refrain
8 from making an inquiry as to those two plaintiffs?

9 MR. McCULLOCH: Yes, Your Honor. Just for the
10 benefit of the court, our intention is to include copyright
11 claims for those plaintiffs in the future but they don't have
12 the necessary information in front of them to proceed. So
13 that's why they are proceeding only in the DEC action. We're
14 trying various ways to get the information either from their
15 agents, through audits of their agents or what have you but at
16 this point we agree since there are no copyright claims for
17 those particular plaintiffs we wouldn't proceed with discovery
18 for those particular plaintiffs because they don't have any
19 copyright claims.

20 THE COURT: Thank you.

21 MR. McCULLOCH: Yes, Your Honor.

22 MS. BEEBER: Your Honor, once again I just want to
23 say that the burden on Wiley of complying with the request
24 that Mr. McCulloch has just outlined on the record is
25 considerable and I do not believe that attaching an exhibit to

1 a complaint that just lists all the images that you know were
2 licensed --

3 THE COURT: I heard you on that the first time and
4 I've made my decision.

5 MS. BEEBER: Thank you, Your Honor.

6 THE COURT: Thank you. So I will look forward to
7 seeing you all on December 6th and to receiving the motion
8 papers. We're adjourned.

9 THE CLERK: All rise.

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1 I certify that the foregoing is a court transcript from
2 an electronic sound recording of the proceedings in the above-
3 entitled matter.

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5 _____
6 Shari Riemer

7 Dated: September 17, 2013
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